84-1662

No.

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IN THE

Supreme Court of the United States

October Term, 1984

DAVID GOLDBERG and JOSEPH YORIZZO,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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59 pp

Question Presented

Was the Court of Appeals decision, which held that three individuals acting together may constitute a "financial institution" pursuant to 31 U.S.C. § 5312, beyond the scope of the statute and contrary to legislative intent?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID GOLDBERG and JOSEPH YORIZZO* petition for a Writ of Certiorari to review an order of the United States Court of Appeals for the Second Circuit, which vacated and remanded an order dismissing Counts 1 and 3 of the indictment entered in the United States District Court for the Southern District of New York.

* In addition to Petitioners GOLDBERG and YORIZZO, the indictment names Kenneth S. Dreifus as a defendant and co-conspirator in Count 1.

Orders Below

An order was issued by the United States Court of Appeals for the Second Circuit on March 6, 1985. In that order the Court of Appeals vacated and remanded the order of the United States District Court for the Southern District of New York. *United States* v. *Goldberg, et al.*, Docket No. 84-1226, *slip op.* (2d Cir. 1985). The opinion of the Court of Appeals is set forth in the Appendix at page 1a.

The vacated order was issued by the United States District Court for the Southern District of New York (Knapp, J.). In that order Judge Knapp had dismissed Counts 1 and 3 of the indictment.* *United States v. Goldberg, et al.*, 587 F.Supp. 302 (S.D.N.Y. 1984). The opinion of the District Court is set forth in the Appendix at page 22a.

Jurisdiction

The order of the Court of Appeals vacating and remanding the order of the District Court was dated and entered March 6, 1985.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

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* Count 2 of the indictment was severed by the District Court and Count 4 was dismissed. The government did not appeal either of these rulings.

Statutes Involved

28 U.S.C. § 1254

§ 1254. Courts of Appeals; *certiorari* appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

31 U.S.C. § 5312

§ 5312. Definitions and application.

(a) In this subchapter—

(2) "financial institution" means—

(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));

(B) a commercial bank or trust company;

(C) a private banker;

(D) an agency or branch of a foreign bank in the United States;

(E) an insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1724(a)));

(F) a thrift institution;

(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

(H) a broker or dealer in securities or commodities;

(I) an investment banker or investment company;

(J) a currency exchange;

(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;

(L) an operator of a credit card system;

(M) an insurance company;

(N) a dealer in precious metals, stones, or jewels;

(O) a pawnbroker;

(P) a loan or finance company;

(Q) a travel agency;

(R) a licensed sender of money;

(S) a telegraph company;

(T) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this clause (2); or

(U) another business or agency carrying out a similar, related, or substitute duty or power the Secretary of the Treasury prescribes.

31 U.S.C. § 5313

§ 5313. Reports on domestic coins and currency transactions.

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

Regulations Involved

31 C.F.R. § 103.11

§ 103.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Financial institutions. Each agency, branch, or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A bank (except bank credit card systems);

(2) A broker or dealer in securities;

(3) A person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) A person who engages as a business in the issuing, selling, or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Statement of the Case

Under a four count indictment petitioners, along with one other Defendant, were all charged with a conspiracy to violate the currency reporting requirements of the Bank Secrecy Act, 31 U.S.C. §§ 5313, 5314, 5315 and 5322(b) in violation of 18 U.S.C. § 371 (Count 1). Petitioner Goldberg was additionally charged with violations of 26 U.S.C. 5861, possession of an unregistered firearm (Count 2), 18 U.S.C. § 925(c)(2), carrying a firearm during the commission of a felony (Count 3) and 18 U.S.C. § 1503, obstruction of justice (Count 4).

In October of 1983 the Internal Revenue Service in conjunction with the Customs Service initiated a sting

operation code named El Dorado. It was part of this operation that a special agent, posing as a persian rug dealer, sought the assistance of the petitioners herein.

On October 19, 1983, special agent Lotz entered United Mizrahi Bank (UMB) where petitioner GOLDBERG was employed and attempted to open an account. GOLDBERG discussed the particulars of opening an account at the bank and requested that the special agent provide certain information which first needed to be verified.

Following this initial meeting with GOLDBERG, Lotz left the bank, agreeing to return later to complete the transaction. Upon his return to the bank, Lotz learned that he could not be accepted as a bank customer. At this point, Lotz pressed petitioner GOLDBERG to assist him anyway. In substance, special agent Lotz indicated to GOLDBERG that he had or was soon to have large amounts of cash in his possession which he wanted to deposit and earn interest upon, without necessarily having to use his own name.

That same day, October 19, 1983, petitioner GOLDBERG, in an effort to accommodate the undercover agent, introduced him to co-defendant DREIFUS, an employee at North American Bank (NAB), a representative office of an Israeli Bank. DREIFUS and GOLDBERG, along with special agent Lotz, discussed various methods of transferring money to accounts in foreign countries and arranging such transactions so no one would necessarily be aware of them. After several telephone conversations concerning, among other things, the defendant's fee, the details of the one planned exchange and vague references to unplanned fu-

ture transactions,* it was arranged, at special agent Lotz's request, that on October 21, 1983, just two days after he had met DREIFUS and GOLDBERG, he would bring $200,000 in cash to the offices of North American Bank. Lotz was to exchange this cash for a UMB bank check made payable to NAB in the sum of $175,000. The bank check was to be drawn on the account of petitioner YORIZZO's employer and then deposited into a NAB bank account to be opened for special agent Lotz in a different name. The $25,000 difference between the cash and the check was the fee for petitioners' services.

On October 21, 1983, a mere two days after this sting was initiated, while the transaction alleged was being negotiated, federal agents raided NAB and arrested the petitioners. Notably, the arrest occurred prior to the completion of the exchange of funds. The instant indictment followed.

Petitioners moved to dismiss Count 1 of the indictment, conspiracy to violate the Bank Secrecy Act, Title 31 U.S.C. §§ 5313, 5314, 5315 and 5322 (b) as insufficiently pleaded and not stating a violation of federal law.** Petitioners specifically claimed, *inter alia,* that the reporting requirement of 31 U.S.C. § 5313 is only triggered when a "financial institu-

* These conversations were part of petitioner GOLDBERG's efforts to assure their $25,000 fee and see that this single planned exchange would transpire.

** In addition to claiming that petitioners were not a "financial institution" as defined by 31 U.S.C. § 5312, petitioners claimed, *inter alia,* that a violation of 31 U.S.C. § 5314 was not sufficiently pleaded and could not apply herein. Although the District Court accepted petitioners' arguments, such were later rejected by the Court of Appeals. Furthermore, GOLDBERG moved to sever Counts 2 and 3 and to dismiss Count 4 as insufficiently pleaded.

tion" is involved in a currency transaction and that in the scenario alleged by the government, there was no currency transactions as defined in § 5313 which involved a "financial institution". The government responded by claiming that the defendants individually and acting together in this single transaction constituted a "financial institution" and thus fell within the reporting requirements of 31 U.S.C. § 5313.

In a memorandum and order dated May 21, 1984, the District Court granted petitioners' motion dismissing Counts 1 and 3* of the indictment. The Court rejected the government's theory. It held that the alleged scheme, did not amount to any violation of federal laws because "[a] single transaction between individuals involving the exchange of a check for currency—even if some future transactions are contemplated—cannot bring one within the definition of 'engaging as a business' in exchanging currency" and thus a financial institution as defined in Title 31 (Appendix at 29a).

The government, thereafter, pursuant to 18 U.S.C. § 3731, appealed the District Court's order to the Court of Appeals. Upon review of the case, the Court of Appeals vacated and remanded the District Court's order holding, *inter alia,* that the definition of a "financial institution" as "[a] person who engages as a business in dealing in . . . currency is sufficiently broad to encompass the activity alleged in Count 1 of the indictment" (Appendix at 11a).

* Count 3 charged petitioner GOLDBERG with carrying a firearm during the commission of a felony, specifically the conspiracy set forth in Count 1.

Reasons for Granting the Writ

The definition and interpretation of a "financial institution" as employed in Title 31, specifically 31 U.S.C. § 5312 and the regulations promulgated thereunder, is an issue both of first impression and national significance. Currently there has been a great deal of attention focused upon "financial institutions" and money laundering by both the government and the media.*

In enacting the Bank Secrecy Act of 1970 and mandating that "financial institutions" report specific monetary transactions, it is unquestionable that Congress sought to "ferret out criminal activity and desired to strengthen the statutory basis for requiring such reports", *California Bankers Association* v. *Schultz,* 416 U.S. 21, 38 (1974). It is equally clear, however, that the restrictions and regulations enacted were intended to apply to banks and other similarly *established* "financial institutions" as evidenced by the legislative history, the statute, the regulations promulgated thereunder and the prosecutions brought pursuant to this Act.

Indeed, the majority of cases brought pursuant to 31 U.S.C. § 5313 have all involved entities which, by plain meaning and common sense, are considered financial institutions. *See, United States* v. *Tobon—Builes,* 706 F.2d 1092 (11th Cir. 1983) (ten banks in northern Florida); *United States v. Thompson,* 603 F.2d 1200 (5th Cir. 1979) (Ridlea Bank of Fort Worth); *United States* v. *Beusch,*

* *See,* Interim Report of President's Commission on Organized Crime, "The Cash Connection. Organized Crime Financial Institutions and Money Laundering."

596 F.2d 871 (9th Cir. 1978) (largest foreign currency exchange dealer in the world); and *United States* v. *Konefal*, 566 F.Supp. 698 (N.D.N.Y. 1983) (various local banks). It follows that, by its prosecutorial theory in this case, the government was travelling in uncharted waters. And the fact that the Second Circuit, which sits in the financial capitol of the nation, has now lent its imprimatur to that theory, will, in the absence of guidance by this court, obviously spawn a host of prosecutions and decisions which are strongly at odds with the clear Congressional intent.

Here, it is the government's contention, adopted by the Court of Appeals, that three individuals acting together to consummate an exchange of cash for a bank check constitute a "financial institution". Specifically, it is alleged that such conduct amounts to "engag[ing] as a business in dealing in or exchanging currency." *See*, 31 C.F.R. 103.11. As we would argue were this petition granted, this overbroad interpretation of 31 U.S.C. § 5312, which has immediate material impact, completely ignores fundamental principles of statutory construction which require that criminal statutes be strictly construed. *United States* v. *Emmons*, 410 U.S. 396 (1973); *United States* v. *McInnes*, 601 F.2d 1319, 1327 (5th Cir. 1979). Specifically, in so ruling, the Court of Appeals ascribed to § 5312 a statute expected to become increasingly utilized, a prosecutorial impact far beyond that envisioned by its draftsmen.

In this regard, in construing § 5312 to include the alleged acts of petitioners the Court of Appeals professed to have relied on the legislative history of the Bank Secrecy Act. But, in attempting to find support for its con-

clusion, the Court provided examples of Congressional intent directly contrary to its own interpretation.

Illustratively, in order to buttress the view that "financial institutions" are increasingly used by criminals to conceal profits, the Court cited the House Report at 10, *reprinted* in 1970, U.S. Code Cong. & Ad. News, 4349, 4395:

> During the last decade, law enforcement agencies have found that the increasing growth of *our financial institutions* has been paralleled by an increase in criminal activity utilizing these institutions. Petty criminals, members of the underworld, those engaging in 'white collar' crime and income tax evaders use, in one way or another, financial institutions in carrying on their affairs.

(Emphasis supplied) (Appendix at 12a). Clearly, the very use of the term "our financial institutions" evidences clear doubt as to whether Congress intended to include all institutions or entities other than those commonly understood by plain meaning and usage to be financial institutions (e.g., banks, savings and loans, brokerage houses, etc.). The twenty-one examples of "financial institutions" enumerated in § 5312 by Congress further strengthens petitioners' contention.

A second example relied upon by the Second Circuit to support its construction of a "financial institution" is equally unavailing. In attempting to illustrate the wide range of entities Congress intended to include in the statute the Court cited the following (Appendix at 13a):

> The subject matter with which we deal is indeed complicated. It involved the operation not only of our domestic and foreign banking *but also other financial*

> ***institutions*** involved in the exchange of currency or its equivalent, the equivalent being in the form of securities, money orders and a host of other financial instruments. 116 Cong. Rec. 16956-57 (1970) (statement of Rep. Widnall).

Again, in referring to "financial institutions" the Congressman used the phrase "our domestic and foreign banking". The use of the term "our" signifies known and established entities and the term "banking" clearly speaks for itself. "Other financial institutions" in this context seems unequivocally to mean those institutions dealing with currency equivalents as in brokerage houses, investment concerns, telegraph companies, pawn brokers, etc. *See,* 31 U.S.C. § 5312 (a)(2)(A-U).

The unprecedented construction of a "financial institution" by the Court of Appeals is clearly at odds with the intent of Congress when it enacted the Bank Secrecy Act. While the courts expansive interpretation would certainly cause more people to come under prosecutorial scrutiny and would possibly expose otherwise concealed criminal activity, this view runs afoul of the clear principles of statutory construction.

The government's argument, as accepted by the Court of Appeals, that because Congress enacted the Bank Secrecy Act to ferret out criminal activity and because petitioners' conduct is alleged to be criminal in nature, the provisions of the Act must perforce apply to petitioners, is disingenuous. This misguided logic which asks the Court to construe a defendant's conduct so that it will somehow fall within the law as enacted calls for nothing short of judicial legislation.

Previously, where there has been doubt as to the applicability of Title 31 reporting requirements to include a specific type of entity, *i.e.*, gambling casinos, such doubt has been resolved legislatively and not judicially. Illustratively, it is an uncontroverted fact that gambling casinos deal extensively in cash, including the exchange of cash for cash and cash for checks on a daily basis. However, until 1985* they did not fall within the definition of a "financial institution", and were hence not governed by the Bank Secrecy Act, despite the indisputable fact that casinos are *engaged as a business in dealing in or exchanging currency.*

That Congress became aware of this legal loophole—*i.e.*, that an entity engaged as a business in dealing in or exchanging currency did not fall within the parameters of Title 31—is evidenced by its amending 31 C.F.R. Part 103. *See,* 50 Fed. Register 25, 5068 (February 6, 1985) (Final Rule). Inasmuch as gambling casinos, until most recently, did not come under the strictures of Title 31 and thus were not deemed "financial institutions" it is evident that Congress when originally enacting this statute, only had in mind those organizations or entities which are commonly considered and generally recognized as "financial

* 31 C.F.R. Part 103 was amended effective May 7, 1985 to add gambling casinos to the definition of a financial institution. Specifically, 31 C.F.R. 103.11 was amended by adding at the end of the definition of "Financial Institution" the following paragraph (6):

> (6)(i) A casino or gambling casino licensed as a casino or gambling casino by a State or local government and having gross annual gaming revenue in excess of $1,000,000.
> (ii) A casino or gambling casino includes the principal headquarters and any branch or place of business of the casino or gambling casino.

instituitons''. Clearly, the amendment to the regulations indicate that prior to their enactment casinos were not considered to be financial institutions or at minimum it was wholly unclear, ambiguous and doubtful whether or not they were so governed by the criminal statute. Where there exists an ambiguity as to the meaning of a statute the rule of lenity is employed to resolve such ambiguity. *Callanan* v. *United States,* 364 U.S. 587, 596 (1961) (cite omitted); *Russello* v. *United States,* 104 S. Ct. 296, 303-304 (1983). The policy of lenity requires that doubt be resolved in favor of the accused. *Ladner* v. *United States,* 169, 178 (1978).

To clarify the state of the law and to avoid ensnaring the unwary and unsuspecting* in the wide net of ''money laundering'' prosecutions so prevalent today, it is incumbent upon this Court as the final arbiter, to construe the boundaries and parameters of ''financial institutions'' within the context of 31 U.S.C. § 5311 *et. seq.*

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* The Court of Appeals' expansive interpretation of "financial institution" would no doubt expose many unwitting and innocently motivated individuals to the threat of prosecution. The exchange of currency from father to son, neighbor to neighbor and shopkeeper to patron could certainly come within the ambit of a "financial institution" as construed by the Court herein and thus place countless individuals in jeopardy, wherein they had no prior notice or knowledge that their conduct was regulated by Federal law.

CONCLUSION

It is respectfully submitted that David Goldberg and Joseph Yorizzo's petition for a writ of certiorari should be granted.

Dated: New York, New York
April 5, 1985

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit Decided March 6, 1985

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 261 August Term, 1984

(Argued: November 15, 1984 Decided: MAR 6 1985)
Docket No. 84-1226

UNITED STATES OF AMERICA,

Appellant,

v.

DAVID GOLDBERG, KENNETH S. DREIFUS,
JOSEPH YORIZZO,

Defendants-Appellees.

Before: OAKES and KEARSE, *Circuit Judges,* and POLLACK, *District Judge.**

Appeal by the United States pursuant to 18 U.S.C. § 3731 from an order of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge, see* 587 F. Supp. 302 (1984), dismissing counts of an indictment charging defendants with, *inter alia,* conspiring to violate reporting requirements of the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.,* in violation of 18 U.S.C. § 371.

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* Honorable Milton Pollack, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

Vacated and remanded.

STACEY J. MORITZ, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Marc J. Gottridge, Assistant United States Attorney, New York, New York, on the brief), *for Appellant.*

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KEARSE, *Circuit Judge:*

The United States of America appeals, pursuant to 18 U.S.C. § 3731 (1982), from an order of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge,* dismissing several counts of an indictment charging defendants David Goldberg, Kenneth S. Dreifus, and Joseph Yorizzo with, *inter alia,* conspiring to violate certain reporting requirements of the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.* (1982) (the "Act"),

in violation of 18 U.S.C. § 371 (1982). In an opinion reported at 587 F. Supp. 302 (1984), the court concluded that, as a matter of of law, the defendants' acts as set forth in count 1 of the indictment and elaborated on in the government's response to defendants' challenges to the indictment could not reflect the conspiracy charged because none of the defendants was required to file any of the reports required by the Act or the regulations promulgated thereunder. On appeal, the government contends that the district court both misinterpreted the indictment and construed unduly narrowly the Act and the regulations implementing it. For the reasons below, we agree and conclude that the indictment adequately alleged that defendants conspired to violate the Act. We vacate the dismissal of counts 1 and 3 and remand the case for further proceedings.

I. Background

In response to the defense motions attacking the indictment, the government submitted to the district court the affidavit of Assistant United States Attorney Stacey J. Moritz ("Moritz Affidavit"), which was based principally on an examination of tapes of conservations between and among the defendants and others in the presence of an undercover Special Agent of the Internal Revenue Service ("IRS") wearing a recording device. In reviewing the district court's dismissal of the indictment, we accept as true all of the allegations of the indictment, as amplified by the Moritz Affidavit. *See, e.g., United States v. Von Barta,* 635 F.2d 999, 1002 (2d Cir. 1980), *cert. denied,* 450 U.S. 998 (1981). Contrary assertions of fact by the defendants will not be considered. *Id.*

A. *The Government's Allegations*

The indictment set forth a scheme in which the defendants conspired to aid an undercover agent in transferring out of the United States large amounts of United States currency and in opening a foreign interest-bearing bank account, all without disclosures to the United States Government, in violation of 31 U.S.C. §§ 5313, 5314, 5315, and 5322(b). It charged, *inter alia,* that defendants (1) "were engaged as a business in dealing in currency"; (2) agreed to provide a money laundering service for cash transfers in the United States that would conceal the true source and holder of the funds, and agreed, as part of that scheme, "to accept in excess of $3 million in cash transfers in the United States in the period October to December 1983"; (3) agreed to open and assist in the opening of foreign bank accounts on the behalf of United States residents and to transfer currency to those accounts, using false documentation to conceal the true identities of the account holders; and (4) agreed they would not file currency transaction reports with respect to any of the transfers.

The government described the defendants' overt acts as follows. On October 19, 1983, IRS Special Agent Marc Lotz, acting undercover, met with Goldberg at United Mizrahi Bank and Trust Co. ("UMB"), where Goldberg was a bank officer. Lotz stated that he had hundreds of thousands of dollars in cash that he wished to move from safe deposit boxes to interest-bearing accounts outside the United States without disclosing those transactions. Later that day, Goldberg informed him that UMB could not accommodate him and took Lotz to the North American Bank, Ltd. ("NAB") to meet Dreifus, whom Goldberg introduced as manager and United States representative of

NAB. Goldberg and Dreifus suggested ways in which Lotz could move his money out of the United States without notifying the United States Government.

On October 20, Lotz and Goldberg spoke by telephone several times. Lotz told Goldberg that he wanted to move two or three million dollars out of the United States. Goldberg informed Lotz of the plan Goldberg and his colleagues had devised for the laundering and transfer of those funds. Lotz would give the defendants currency; he would receive in exchange a UMB bank check drawn on a UMB customer's account made payable to NAB; the NAB check would then be used to open Lotz's foreign bank account and would not be traceable to Lotz.

Goldberg at first demanded thirty percent of any money thus laundered as the defendants' fees for the laundering. Subsequently, however, he agreed subject to checking with his partners, to accept $25,000 to launder the first $200,000, on the understanding that this would be a test run for the eventual laundering of a total of $3,000,000. Goldberg stressed the federal government would never learn of the transaction nor learn that Lotz was earning interest abroad.

On October 21, Lotz arrived at NAB with $200,000 in currency. He met with Goldberg and Dreifus and was introduced to Yorizzo, a retired policeman. In exchange for his $200,000, Lotz was given a UMB bank check for $175,000, drawn on Yorizzo's account. Upon Lotz's arrival at the meeting, Goldberg displayed a handgun and he and Yorizzo demanded to frisk Lotz for a body wire. Goldberg overrode Lotz's protests against the search, stating that precautions were necessary because they were engaged in an illegal transaction.

During this meeting, Goldberg and Yorizzo began counting Lotz's cash on a machine brought to the bank

by Yorizzo, and Dreifus prepared documents to open an Israeli bank account for Lotz. Two sets of papers were prepared: one under the "real" name Lotz was using in his undercover capacity and one under a new fictitious name. Dreifus repeatedly assured Lotz that the papers bearing his "real" name would be locked away. After Dreifus had prepared the two documents, and just before Goldberg and Yorizzo had finished counting the $200,000, a team of IRS agents entered the room and arrested the three defenants. The present indictment followed.

B. *The Proceedings Below*

Count 1 of the indictment charged the defendants with conspiracy, in violation of 18 U.S.C. § 371, to violate 31 U.S.C. § 5313 and the regulations thereunder (which require the reporting of transactions involving more than $10,000 in currency) by causing "various financial institutions" to fail to file the mandated currency transaction reports, "as part of a pattern of illegal activity involving transactions exceeding $100,000 in a twelve month period." Count 1 also alleged that defendants had conspired, in violation of 18 U.S.C. § 371, to violate 31 U.S.C. § 5314, which requires the reporting of transactions with foreign financial agencies. In pretrial motions the defendants challenged the sufficiency of count 1 on the ground that the conduct alleged did not constitute a federal offense because none of the transactions engaged in by the defendants triggered a requirement under the Act for the filing of reports. The district court agreed, stating that "[a]lthough defendants' actions might indicate a ready willingness to engage in criminal conduct," 587 F. Supp. at 304, the allegations of the indictment failed to describe a conspiracy to violate 31 U.S.C. §§ 5313 or 5314.

The court held that § 5313 was not implicated because the defendants were not financial institutions nor had they caused a financial institution to fail to file a required report. It rejected what it characterized as the government's "main contention," *i.e.*, that "each defendant himself [was] a 'financial institution'," finding that such a contention was inconsistent with the plain meaning of the Act. 587 F. Supp. at 306-07. Finding misplaced the government's reliance on the definition of "financial institution" in 31 C.F.R. § 103.11 (1984) as "[a] person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks," the court concluded that

> [a] single transaction between individuals involving the exchange of a check for currency—even if some future transactions are contemplated—cannot bring one within the definition of "engaging as a business" in exchanging currency. The example given by the regulation, "a person engaged primarily in the cashing of checks," makes it clear that it does not apply to an individual whose primary occupation is something else but who embarks upon an isolated—or even a series of isolated—transactions involving the exchanging of a check for currency.

587 F. Supp. at 307.

The court also concluded that the indictment did not show a conspiracy to violate § 5314 because there was no suggestion that any of the defendants had an interest in a foreign interest-bearing account:

> The Government offers no explanation of how defendants may have violated this section which appears to be directed at individuals with interests in

> foreign accounts. It is not even suggested that any of the defendants had any such interest. We fail to see a violation of § 5314.

Id. at 309.

Accordingly, the district court dismissed count 1 of the indictment. In addition, the court dismissed count 3, which alleged that Goldberg unlawfully possessed a firearm during the commission of the felonies charged in count 1, in violation of 18 U.S.C. § 924(c)(2) (1982), on the ground that count 3 was dependent on count 1; and it dismissed count 4 which charged Goldberg with obstruction of justice, in violation of 18 U.S.C. § 1503 (1982), on the ground that that offense was insufficiently pleaded. The court did not dismiss Count 2, which charged Goldberg with possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5861, 5871 (1982); it stayed trial on count 2 pending disposition of the present appeal.

C. *The Issues on Appeal*

On appeal, the government does not challenge the court's dismissal of count 4, but it argues that the court erred in dismissing count 1 (and perforce count 3) because (1) the defendants could be viewed, jointly, as a financial institution within the meaning of the Act, and (2) the fact that no defendant actually possessed an interest in a foreign bank account as contemplated by § 5314 was irrelevant to the charge that they conspired to violate that section.

Finding merit in both the government's arguments, we vacate the dismissal of counts 1 and 3 and remand for further proceedings.

II. Discussion

The Bank Secrecy Act was enacted in 1970 "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311. To accomplish that end, the Act established reporting requirements for domestic transactions in United States currency and for transactions involving foreign financial agencies, and pursuant to the Act the Secretary of the Treasury ("Secretary") has promulgated various regulations.

A. *The Alleged Conspiracy To Violate the Domestic Reporting Requirments of § 5313*

The domestic reporting requirements are governed by § 5313, which provides, in pertinent part, as follows:

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

31 U.S.C. § 5313(a). Section 5322(b) of the Act provides that

> [a] person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions or more than $100,000

> in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

The regulation setting forth the reporting requirements envisioned by the Act states, in pertinent part, as follows:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

31 C.F.R. §103.22(a) (1984). Since § 5313, as implemented by the regulation, requires reports only by "financial institution[s]," the principal question on this appeal with respect to the alleged conspiracy to violate § 5313 is whether defendants' activities involved such an institution.

The term "financial institution" is defined in both the statute and the regulations. Section 5312(a)(2) of 31 U.S.C. provides twenty-one definitions of "financial institution," including "an insured bank," § 5312(a)(2)(A); "a commercial bank or trust company," § 5312(a)(2)(B); "a private banker," § 5312(a)(2)(C); "a currency exchange," § 5312(a)(2)(J); "an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments," § 5312(a)(2)(K); and "another business or agency carrying out a similar, related, or substitute duty or power the Secretary of the Treasury presribes," § 5312(a)(2)(U). The Secretary's regulations define "financial institution" as follows:

> *Financial institution.* Each agency, branch, or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A bank (except bank credit card systems);

(2) A broker or dealer in securities;

(3) A person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) A person who engages as a business in the issuing, selling, or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

31 C.F.R. § 103.11. We conclude that the part of definition (3) that defines a financial institution as "[a] person who engages as a business in dealing in . . . currency" is sufficiently broad to encompass the activity alleged in count 1 of the indictment and that its breadth reflects Congress's intent.

The legislative history of the Act indicates that the Act's reporting requirements were designed to provide a sweeping law enforcement tool for locating, *inter alia*, large transfers, in currency, of the proceeds of unlawful transactions. The report by the House of Representatives Committee on Banking and Currency on H.R. 15073, which eventually became the Act, noted as follows:

> Criminals deal in money—cash or its equivalent. The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity. The money in many of these transactions may repre-

> sent anything from the proceeds of a lottery racket to money for the bribery of public officials.
>
> . . . [The Act] requires reports of cash transactions involving such amounts, or taking place under such circumstances, as the Secretary of the Treasury shall by regulation prescribe. . . . These reports may be of considerable value to law enforcement agencies in criminal investigations and prosecutions.

H.R. Rep. No. 975, 91st Cong., 2d Sess. 11-12, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4396-97 [hereinafter cited as House Report]. *See also California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 38 (1974) ("Congress recognized the importance of reports of large and unusual currency transactions in ferreting out criminal activity and desired to strengthen the statutory basis for requiring such reports."); 116 Cong. Rec. 16954 (1970) (statement of Rep. Patman) ("If certain cash transactions are required to be reported to the Treasury Department, law enforcement agencies, particularly in the income tax field, will have a useful tool in their investigations and proceedings.")

In seeking to ferret out those engaged in criminal activity, Congress focused on criminals' increasing use of financial institutions to preserve or conceal the proceeds of their crimes:

> During the last decade, law enforcement agencies have found that the increasing growth of our financial institutions has been paralleled by an increase in criminal activity utilizing these institutions. Petty criminals, members of the underworld, those engaging in "white collar" crime and income tax evaders use, in one way or another, financial institutions in carrying on their affairs.

House Report at 10, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4394, 4395. Congress also recognized that a

wide range of entities could be used to effect the transfers of large amounts of cash:

> The subject matter with which we deal is indeed complicated. It involves the operation not only of our domestic and foreign banking *but also other financial institutions* involved in the exchange of currency or its equivalent, the equivalent being in the form of securities, money orders and a host of other financial instruments.

116 Cong. Rec. 16956-57 (1970) (statement of Rep. Widnall) (emphasis added). It thus sought to reach the maximum amount of criminal conduct possible, and to grant broad authority to the Secretary to impose reporting requirements.

> Under the terms of [the Act], the Secretary of the Treasury is granted broad authority to impose reporting requirements on persons and *all other entities cognizable as legal personalties* [*sic*] transferring money or monetary instruments to foreign countries.

Id. at 16957 (statement of Rep. Burton) (emphasis added). Congress's assumption was that the reporting requirements would be far-reaching, with the Secretary empowered to exempt normal business transactions from the reporting requirements. *See id.* at 16964-65 (statement of Rep. Hanley).

The Secretary's definition of a financial institution, from which a report is required, as "[a] person who engages as a business in dealing in . . . currency," 31 C.F.R. § 103.11, is plainly consistent with Congress's goal of requiring reports from "all . . . entities cognizable as legal personal[i]ties" that could be used as instrumentalities for transferring or exchanging currency. Since count 1 of the indictment, as amplified by the Moritz Affidavit, adequately charges that the defendants were engaged as a

business in dealing in currency and that the defendants themselves constituted a financial institution that intended not to file reports we conclude that the indictment alleged activities that fit within this definition.

The district court concluded that there were two flaws in count 1's allegation of a conspiracy to violate § 5313. First, it thought the indictment charged that each individual defendant was himself a financial institution, and saw such a characterization as contrary to the plain meaning of the Act. Second, the court read the indictment as charging but a single instance of currency dealing, and apparently concluded that the defendants, individually or jointly, could not be said to be in the "business" of dealing in currency. We disagree with both views.

As to the first, even assuming that the indictment charged that each defendant individually was a financial institution, we would not view such a characterization as outside the intended scope of the Act or the regulations. The regulations define a financial institution in part as "a person." There is no indication in the statute or the regulations that a natural person cannot be considered a financial institution, and it seems strained to assume that the term "person" was intended to exclude natural persons. Nor is the term "person" limited to natural, discrete individuals. Section 5312(a)(4) of the Act defines "person," in part, by incorporating the definition of that term found in 1 U.S.C. § 1 (1982), which encompasses corporations and partnerships. We need not determine here, however, whether the indictment properly alleged that each individual defendant constituted a financial institution, for the indictment asserted that the defendants "agreed together" to violate the Act's reporting requirements and that they "were engaged as a business in dealing in currency." The

most natural reading of these allegations is that defendants were jointly so engaged. This view is supported by the Moritz Affidavit, which recounted, on the basis of taped conversations, that Goldberg and Dreifus suggested to Lotz various methods for transferring currency without reporting; that Goldberg's agreement on a reduced initial laundering fee was made expressly subject to his partners' approval; that Goldberg and Yorizzo insisted on searching Lotz for a wire; that Yorizzo (the only nonbanker among the defendants) brought to the bank a money-counting machine with which he and Goldberg proceeded to count Lotz's cash. Plainly it would be within the terms of the indictment for a jury to find that the defendants had acted as a partnership or joint venture to assist Lotz in laundering currency. We think it clear beyond peradventure that partnerships and joint ventures are among the entities from which Congress sought to require reports.

Further, we disagree with the district judge's view that the indictment failed to substantiate that the defendants engaged in the "business" of dealing in currency because it charged that but a single transaction was involved. Rather, the government charged that the interrupted $200,000 transaction was anticipated by the defendants to be but the first of a series of laundering transactions to take place over the course of several months; that that first $200,000 was less than 10% of the total amount defendants agreed to launder; and that defendants agreed to reduce their 30% laundering fee by more than half for the first $200,000 in anticipation of the fees they would receive for the remainder of the planned $3 million. Thus, while we agree with the district court that the terms "engage[] as a business" or "deal[] in" imply that ordinarily proof of more than one transaction would be required, *cf. United*

States v. *Tarr*, 589 F.2d 55, 59 (1st Cir. 1978) ("deal[ing] in" or "engag[ing] in the business of" firearms, within the meaning of 18 U.S.C. § 922(a)(1) (1982), normally implies more than one isolated transaction, although court could "conceive of a single transaction sufficiently large" to be within statute), we conclude that the indictment alleged that a series of transactions had been agreed on and that it is a permissible inference that persons who agree to launder a total of $3 million over a three-month period for fees totaling some $900,000 are doing business. In sum, we conclude that the indictment sufficiently alleged that defendants, as a partnership or joint venture, had engaged as a business in dealing in currency.

Defendants urge us to reach the contrary conclusion by (1) interpreting the terms "financial institution" and "business" as referring only to legitimate enterprises, (2) adopting the view of the district court that the third definition of § 103.11 reaches only persons whose "primary" occupation is exchanging or dealing in currency, or (3) employing the "rule of lenity." We find no merit in any of these contentions.

First, the notion that the Act was meant to require reports only from legitimate entities is contrary to the entire thrust of the Act. Its very purpose was "to give the Secretary authority which will facilitate investigation and prosecution of criminal activities." 116 Cong. Rec. 16957 (1970) (statement of Rep. Widnall). Thus, as to actors transferring money to a foreign country, the Act was intended to impose reporting requirements on "all . . . entities cognizable" as personalities in the eyes of the law. *Id.* (statement of Rep. Burton). We find no support for defendants' argument in the Act, in its history, or in logic.

Nor is there any sound basis for imputing to Congress the intent to reach only persons whose "primary" occupa-

tion was dealing in currency. Defendants point only to the second example set out in the third definition of § 103.11, which, after defining "financial institution" as "[a] person who engages as a business in dealing in or exchanging in currency," illustrates by adding "as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks." There is no indication that the word "primarily" should be read as applying to the regulation's basic definition. If the Secretary had intended such a limitation, it would have been a simple matter to insert the word "primary" before "business," thereby defining a financial institution as a person "who engages as a *primary* business" in dealing in currency. The plain fact is that the regulation was not so written, and we see no support for the proposition that defendants are outside the reach of the Act because they may have engaged in the business of money laundering only as a sideline.

Finally, we reject defendants' contention that the rule of lenity sometimes employed in the construction of criminal statutes, *see, e.g., Ladner v. United States,* 358 U.S. 169, 177-78 (1958), requires the conclusion that defendants' conduct was outside the Act's scope. The rule of lenity is used only to resolve an ambiguity, "not to . . . beget one." *Callanan v. United States,* 364 U.S. 587, 596 (1961) (footnote omitted); *Russello v. United States,* 104 S. Ct. 296, 303-04 (1983). Nor is it used to narrow a statute that has an unambiguously broad thrust. *See United States v. Moore,* 423 U.S. 122, 145 (1975). Since the statutory and regulatory provisions unambiguously cover the defendants' alleged conduct here, the rule of lenity does not come into play.

We conclude that the indictment adequately alleged activities of the defendants that, if proven, would permit the jury to find that they jointly engaged as a business in deal-

ing in currency and thus were a financial institution within the meaning of the Act and the regulations. The district court erred, therefore, in concluding that the indictment failed to charge defendants with conspiring to commit acts that could be found to trigger the Act's reporting requirements.

B. *The Alleged Conspiracy To Violate the Foreign Transaction Reporting Requirements of § 5314*

The Act's reporting requirements with respect to transactions with foreign financial agencies are set forth in 31 U.S.C. § 5314, which, unlike § 5313, imposes those requirements on "resident[s] or citizen[s] of the United States" rather than on financial institutions as such. Section 5314 provides in pertinent part as follows:

> (a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:
>
> (1) the identity and address of participants in a transaction or relationship.
>
> (2) the legal capacity in which a participant is acting.
>
> (3) the identity of real parties in interest.

(4) a description of the transaction.

31 U.S.C. § 5314(a). The pertinent regulation provides in part as follows:

> Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship to the Secretary for each year in which such relationship exists, and shall provide such information as shall be specified in a reporting form prescribed by the Secretary to be filed by such persons.

31 C.F.R. § 103.24 (1984).

In the present case, the district court ruled that the indictment did not sufficiently allege an offense under § 5314 because that section requires reports from an individual having an interest in foreign accounts and it was not alleged that any of the defendants had such an interest. 587 F. Supp. at 309. The court's conclusion does not follow from its premises.

The indictment charged defendants with conspiracy to violate § 5314, in violation of the conspiracy statute, 18 U.S.C. 371, not with a substantive violation of § 5314. Though there was no indication in the indictment that any of the defendants themselves had or were to acquire an interest in a foreign bank account as to which they would be required to report, count 1 fairly alleged that defendants conspired to violate § 5314 by helping Lotz to place large amounts of cash in a foreign account without reporting the fact of such transfers and by providing a service that would conceal the true source and true holder of the funds in such an account. Thus, the indictment, although it did not mention 18 U.S.C. § 2 (1982), the aiding and abetting section, adequately set forth factual allegations which, if proven,

would allow the jury to find that defendants had conspired to aid and abet Lotz in failing to report an interest in a foreign bank account. *See United States v. Perry,* 643 F.2d 38, 45-46 (2d Cir.) (defendants may be convicted of conspiring to aid and abet another to commit a substantive offense), *cert. denied,* 454 U.S. 835 (1981); *United States v. Taylor,* 464 F.2d 240, 242 n.1 (2d Cir. 1972) (aiding and abetting theory may be submitted to jury though indictment did not charge a violation of 18 U.S.C. § 2).

Nor is the fact that there was no actual violation of § 5314 because Lotz never acquired an interest in such an account any impediment to the imposition on defendants of liability for conspiracy. A substantive offense and a conspiracy to commit that offense are separate and distinct crimes. *Callanan v. United States,* 364 U.S. 587, 593 (1961); *Pinkerton v. United States,* 328 U.S. 640, 643 (1946); *United States v. Tombrello,* 666 F.2d 485, 489 (11th Cir.), *cert. denied,* 456 U.S. 994 (1982). A defendant thus may be convicted of the crime of conspiracy even if the substantive offense was not actually committed. *See United States v. Rose,* 590 F.2d 232, 235 (7th Cir. 1978), *cert. denied,* 442 U.S. 929 (1979).

Finally, while a person acting as an agent of the government cannot be a coconspirator, *see United States v. Tombrello,* 666 F.2d at 490 n.3; *United States v. Chase,* 372 F.2d 453, 459 (4th Cir.), *cert. denied,* 387 U.S. 907 (1967), the presence of such an agent does not destroy a conspiracy in which at least two other private individuals have agreed to engage in an unlawful venture, *see, e.g., United States v. Elledge,* 723 F.2d 864, 866 (11th Cir. 1984), and defendants may be convicted of conspiracy even if, unbeknownst to them, the substantive crime would never have been committed because the person the coconspirators thought would

commit it was actually an agent of the government, *see United States v. Rose*, 590 F.2d at 235 (fact that defendants' "plan was doomed because they unwittingly chose as their instrumentalities agents of the government is irrelevant to the existence of the conspiracy"); *United States v. Seelig*, 498 F.2d 109, 113 (5th Cir. 1974) ("fact that a government informant was to effect the actual distribution of the drug does not extirpate [the defendants'] liability for conspiring to violate the law").

We find no merit in defendants' contentions that the indictment does not sufficiently plead conspiracy and that they did not have the requisite intent to violate § 5314. Count 1, which expressly invoked § 5314, contained sufficient factual allegations to appraise the defendants of the government's contentions as to the time, place, and nature of, and participants in, the alleged conspiracy to violate that section, as well as many overt acts allegedly done in furtherance thereof. A conspiracy to violate § 5314 was therefore adequately pleaded. *See Wong Tai v. United States*, 273 U.S. 77, 80-81 (1927) (indictment for conspiracy need not be pleaded with the same particularity as would be required of an indictment for substantive offense so long as defendant is adequately advised of what charges he must meet). To the extent that defendants argue that they lacked the requisite intent to violate § 5314, they raise factual questions to be determined at trial, not on this appeal.

We have examined all of defendants' other contentions and find them to be without merit.

Conclusion

The dismissal of Counts 1 and 3 of the indictment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

APPENDIX B

Memorandum and Order of the United States District Court

UNITED STATES OF AMERICA

v.

DAVID GOLDBERG, KENNETH DREIFUS and JOSEPH YORIZZO,
Defendants.

No. 83 CR 727 (WK).

United States District Court,
S.D. New York.
May 21, 1984.

Rudolph W. Giuliani, U.S. Atty., S.D.N.Y. by Stacey J. Moritz, Asst. U.S. Atty., New York City, for plaintiff.

Barry I. Slotnick, P.C. by Barry I. Slotnick, Jill G. Okun, New York City, for defendant Goldberg.

Sudler & Barth by Peter D. Sudler, New York City, for defendant Dreifus.

Polstein, Ferrara & Campriello by Robert Polstein, New York City, for defendant Yorizzo.

Memorandum and Order

Whitman Knapp, District Judge.

This case involves the activity of three defendants who schemed to aid a third party in opening a foreign bank account without triggering any reporting requirements which would alert the Government to the transaction. The Government's principal contentions are set forth in count one of the indictment. It is there charged that defendants conspired to violate Title 31, United States Code, §§ 5313, 5314, 5315, and 5322(b). Defendants assert that, even if everything the Government says is true, their actions do not constitute the crime charged and move for dismissal of the indictment. Although defendants' actions might indicate a ready willingness to engage in criminal conduct, we find they do not constitute the conspiracy charged.

Background

The Government contends—and for present purposes we assume—that the following occurred between October 19th and 21st, 1983. On October 19th Special Agent Marc Lotz of the Internal Revenue Service, posing as a potential bank customer, met with defendant David Goldberg, an officer of the United Mizrachi Bank ("UMB"), at its New York office. He told Goldberg that he was a Persian rug dealer and that he wanted to open a personal checking account. Later in the conversation Lotz told Goldberg that he had hundreds of thousands of dollars in cash which he wished to move from safe deposit boxes to accounts in a foreign country, and that he wanted these transactions arranged so that no one would be aware of them. Goldberg assured Lotz that the bank could accommodate his

present and future needs. With respect to the personal checking account, Goldberg suggested that the account be opened with only nine thousand dollars in cash, and that the remainder be deposited later. This, he explained, would enable the bank to avoid a regulation requiring it to file a currency transaction report informing the Internal Revenue Service of the deposit. Lotz agreed to follow the advice and filled out various forms with which to open the account. It is not clear whether the first nine thousand was in fact deposited, but it is clear that the scheme was never completed. When Lotz returned later in the day Goldberg informed him that the bank had decided not to accept the account.

To deal with this refusal, Goldberg offered to take Lotz to another bank which would be able to accommodate his needs. Goldberg walked Lotz over to the North American Bank Ltd. ("NAB"), a representative branch of an Israeli bank, where they met with defendant Kenneth Dreifus, who was introduced as manager of the branch. Dreifus, Goldberg and Lotz discussed means by which Lotz could move cash out of the country without the Government being notified. The parties' main concern was to avoid triggering any banking regulations which would require a financial institution to file a report with the Internal Revenue Service. They settled on the following plan: Lotz would purchase a cashier's check which he would deposit with NAB to open a foreign account. As will be discussed below, such a transaction would not trigger a reporting requirement. He would purchase the cashier's check for a fee of $25,000 from defendant Joseph Yorizzo or Yorizzo's employer, Future Positions, a gasoline wholesaler. The check would be drawn on Future

Positions's account with UMB and made payable to NAB, thus eliminating any traceable connection between the check and Lotz.

On October 20th Lotz and Goldberg spoke by telephone several times. In the first of these conversations Goldberg indicated that he believed that Lotz's money had been derived from the sale of narcotics. In a subsequent conversation Goldberg told Lotz that to justify the withdrawal of the $175,000 from Future Positions's account, Future Positions was insisting on receiving from Lotz a document showing the purchase and payment of $175,000 in Persian rugs. Lotz agreed to this condition.

On October 21st defendant Yorizzo, in the regular course of his employment as a messenger for Future Positions, collected $298,000 in cash from various customers and deposited it with Future Positions's account at UMB. UMB filed a currency transaction report accurately reflecting the source of these funds. Yorizzo apparently then withdrew $175,000 in the form of a cashier's check made payable to NAB.

Later in the day, as arranged, Lotz went to NAB with the $200,000 in cash. There he met with Goldberg, Yorizzo and Dreifus and exchanged the cash for the $175,000 cashier's check. While Yorizzo counted the cash, Dreifus prepared documents to enable Lotz to open a foreign account. These papers consisted of two sets of forms, one containing Lotz's supposed [undercover] identity and one containing a different fictitious name Dreifus assured Lotz that the form containing the supposedly real identity would be locked away. At this point Lotz's back-up team entered and arrested the three defendants. It is not suggested that any defendant had formed any plan to deposit any portion of this $200,000 in any bank account.

DISCUSSION

Count one of the indictment charges the defendants with conspiring to violate Title 31, United States Code, §§ 5313, 5314, 5315, and 5322(b). As § 5322(b) is merely an enhancement provision,[1] we will address alleged violations of only the preceeding sections.

Section 5313 provides, in relevant part:

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coin or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

The implementing regulation requires that each financial institution file a report with the Commissioner of Internal Revenue of every transaction involving currency of more than $10,000. 31 C.F.R. § 103.22. The report must be made on Treasury form 4789 commonly called a "currency transaction report." The completed form indicates who conducted the transaction with the financial institution as

1. 31 U.S.C. § 5322(b) provides:

> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

well as for whom the transaction was completed. Thus, to violate § 5313 or the regulations promulgated thereunder, one must either be a financial institution or must cause a financial institution to fail to file a required report and the transaction in question must involve more than $10,000 in currency.[2]

The Government's main contention is that each defendant himself is a "financial institution" and as such was required to file a currency transaction report on receipt of the $200,000 cash. We find absolutely no support for such a contention. The term "financial institution" is defined in 31 U.S.C. § 5312 and in 31 C.F.R. § 103.11. The statute simply lists twenty-one different types of individuals or organizations, none of which could by any stretch of the imagination be said to apply to any of the instant defendants. The Government in its brief tangentially refers to the term "private banker," the third of

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2. This framework for violation of the statute comports with the Congressional purpose, articulated by the Supreme Court in *California Bankers Ass'n. v. Schultz* (1974) 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812, behind passage of the subchapter. As the Court observed, one concern Congress had was

> to insure that domestic banks and financial institutions continue to maintain adequate records of their financial transactions with their customers. Congress found that the recent growth of financial institutions in the United States had been paralled by an increase in criminal activity which made use of these institutions. While many of the records which the Secretary by regulations ultimately required to be kept had been traditionally maintained by the voluntary action of many domestic financial institutions, Congress noted that in recent years some larger banks had abolished or limited the practice of photocopying checks, drafts, and similar instruments drawn on them and presented for payment. The absence of such records, whether through failure to make them in the first instance or through failure to retain them, was thought to seriously impair the ability of the Federal Government to enforce the myriad criminal, tax, and regulatory provisions of laws which Congress enacted.

Id. at 26-27, 94 S.Ct. at 1500-1501.

the listed classifications. It needs no argument to demonstrate that that term neither applies to an employee of a commercial bank (defendants Goldberg and Dreifus) or of a gasoline wholesaler (defendant Yorizzo). The regulation defines the term as follows:

> Each agency, branch, or office within the United States of any person doing business in one or more of the capacities listed below:
>
> (1) A bank (except bank credit card systems);
>
> (2) A broker or dealer in securities;
>
> (3) A person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;
>
> (4) A person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;
>
> (5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

The Government argues that since defendants accepted $200,000 in currency in exchange for a bank check and since they agreed to conduct similar transactions in the future, the defendants may be considered financial institutions within the meaning of the regulation. Such a contention flies in the face of its plain meaning and finds no support in case law. To be considered a financial institution the regulation requires that an agency, branch, or office of a person do business in one of several capacities. On such capacity —and the only one which the Government claims to be rel-

evant—is "engag[ing] *as a business* in dealing in or exchanging currency as, for example, . . . a person engaged *primarily* in the cashing of checks." (Emphasis added.) 31 C.F.R. § 103.11(3). A single transaction between individuals involving the exchange of a check for currency—even if some future transactions are contemplated—cannot bring one within the definition of "engaging as a business" in exchanging currency. The example given by the regulation, "a person engaged primarily in the cashing of checks," makes it clear that it does not apply to an individual whose primary occupation is something else but who embarks upon an isolated—or even a series of isolated—transactions involving the exchanging of a check for currency.

The weakness of the Government's claim that each defendant was a financial instiution was most cogently illustrated during oral argument when the only support offered was *United States v. Eduardo Orozco-Prada, et al.* (2d Cir.1984), 732 F.2d 1076[3], a case that lends no support whatsoever. In *Orozco* the named defendant conceded at trial that he was acting as a financial institution, and it was obvious that what he did was within the regulatory definition. Orozco's organization—Cirex International—had as its principal, if not only activity, a "foreign exchange business." That is, Orozco moved cash through eighteen different bank accounts, mostly in the names of other people or various Panamanian corporations. In addition, he and his partner had made efforts to obtain a license to act as a foreign exchange house—apparently to "legitimize" what they were already doing.

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3. The Court of Appeals later affirmed the district court without reference to any definition of "financial institution." *United States v. Eduardo Orozco-Prada, et al.*, 732 F.2d 1076 (2d Cir. 1984).

In no other case cited by the Government was a person or organization not primarily engaged in some form of banking found to be a financial institution. *United States v. Konefal* (N.D.N.Y.1983) 566 F.Supp. 698 (bank), *United States v. Tobon-Builes* (11th Cir.1983) 706 F.2d 1092 (bank), *United States v. Thompson* (5th Cir.1979) 603 F.2d 1200 (bank).

In brief, the Government has been able to cite to no authority to suggest that any of these defendants—none of whom is either a "private banker" or an individual engaged "primarily" in the cashing of checks—was obliged to file any of the reports required by the regulations.

Having rejected the Government's main contention, we turn to the question of whether the defendants caused, or conspired to cause, a financial institution to fail to file a required report. To answer this question we must determine whether any of the defendants' acts—or contemplated acts—did, or could have, triggered a reporting requirement. Defendant Yorizzo deposited $298,000 with Future Position's account at UMB. This transaction required the bank to file a currency transaction report, which report, accurately reflecting the fact that Yorizzo had collected the deposited money from his employer's customers, was duly filed. Lotz then delivered $200,000 in cash to the defendants. Since the defendants themselves were not financial institutions, this transaction triggered no reporting requirement. Moreover, there is no allegation that any defendant ever intended to deposit any portion of the $200,000 in any bank account.[4] Finally, the defendants planned to deposit the $175,000 bank check with NAB. Since a bank check is not

4. In a letter to the Court dated April 20, 1984 Assistant United States Attorney Stacy Moritz specifically stated that "[t]he Government will not be proving that the conspirators planned to deposit the $200,000 in cash at the United Mizrachi Bank or any other bank."

"currency" within the meaning of the statute, this transaction also required no report.[5] The defendants therefore did not cause, nor did they contemplate any act which could have caused, a financial institution to fail to file a report in violation of § 5313.

The Government contends that a violation can nonetheless be found if defendants structured a transaction in such a way as to avoid a reporting requirement. To support this contention the Government relies on *United States v. Thompson* (5th Cir.1979) 603 F.2d 1200, *United States v. Tobon-Builes* (11th Cir.1983) 706 F.2d 1092, and *United States v. Konefal* (N.D.N.Y. 1983) 566 F.Supp. 698. In each of these cases, however, a defendant artificially broke up a currency transaction to conceal from a bank its obligation to file the report that would be required by the transaction as a whole.

In *United States v. Thompson, supra,* the defendant, Chairman of the Board of the Ridglea Bank, arranged for one Michael Welch to receive a series of loans. The defendant had five separate notes prepared, each in the amount of $9,000. He personally processed the notes and, upon presentation to a commercial teller, received $45,000 in cash in five separate $9,000 bundles which he immediately transferred to Welch. Form 4789 (the currency transaction report) contains an instruction specifying that "[m]ultiple transactions by or for any person which in one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them." Thus, the defendant structured his transaction to conceal from

5. 31 C.F.R. § 103.11 defines currency as "The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes U.S. silver certificates, U.S. notes and Federal Reserve notes, *but does not include bank checks* or other negotiable instruments not customarily accepted as money." (Emphasis added.)

the bank its obligation to file the currency transaction report specifically called for by the quoted instruction.

In *Tobon-Builes, supra,* the defendant and a companion acting on his behalf, went to ten banks in a six-hour period and at each made pairs of cash purchases of cashiers checks, each totaling approximately $18,000. The Court considered the reporting requirements of Title 31 and the regulations promulgated thereunder, and concluded that the defendant was involved in "at least 10 'transactions in currency of more than $10,000' which [in toto] were clearly within the ambit of the financial institution reporting requirements." 706 F.2d at 1098. As in *Thompson,* the Court concluded that the defendant could not circumvent a reporting obligation by breaking up a single transaction into deceptively small components. *Id.*

In *Konefal, supra,* the indictment charged that defendant purchased cashier's checks at various banks in amounts less than the $10,000 threshold to prevent the banks from filing currency transaction reports. On the basis of *United States v. Thompson, supra,* the Court found the activities to amount to a series of single transactions constituting a violation of 31 U.S.C. § 5313.

In the case at bar, unlike those cited by the Government, every transaction was what it purported to be. The defendants purchased a cashier's check from an individual and deposited that check with a branch of a foreign bank. No obligation to file a report was triggered; no obligation to file a report was concealed. The Goverment's position seems to boil down to the contention that in enacting Title 31 §§ 5313, 5314 and 5315, Congress was not providing a carefully structured set of requirements which must be strictly obeyed, but was laying down a broad

horatory exhortation that anyone contemplating the transfer of funds to a foreign country should find some way of notifying the Government.[6]

Turning to § 5314, it provides, in pertinent part:

> . . . The Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in the United States to keep records, file reports, or keep records and file reports, when the resident, citizen or person makes a transaction or maintains a relation for any person with a foreign financial agency.

The regulations promulgated under this section require that each person subject to the jurisdiction of the United States having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report the relationship to the Secretary for each year in which such relationship exists. 31 C.F.R. § 103.24. Pursuant to this regulation, persons with foreign accounts must report such accounts on yearly tax returns. *California Bankers Ass'n. v. Shultz* (1974) 416 U.S 21, 37, 94 S.Ct. 1494, 1505, 39 L.Ed.2d 812.

The Government offers no explanation of how defendants may have violated this section which appears to be

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6. Illustrative of the fallacy of the Government's free-wheeling theory that the regulations should be interpreted to prohibit any perceived evil is the circumstance that gambling casinos, which deal extensively in cash, and exchange checks for cash on a regular basis are not considered to fall within the regulatory definition of "financial institution," and are not required to file currency transaction reports with the Internal Revenue Service. To remedy this situation, an amendment to the regulations has been suggested which would declare casinos to be financial institutions for the purpose of the Act. *See* Statement of the Honorable Robert E. Powis, Deputy Assistant Secretary (Enforcement), United States Treasury Department, before the Subcommittee on Crime, Committee on the Judiciary, House of Representatives, February 10, 1984.

directed at individuals with interests in foreign accounts. It is not even suggested that any of the defendants had any such interest. We fail to see a violation of § 5314.

The remaining section, § 5315, neither requires nor prohibits any activity. Regulations promulgated pursuant to it, however, require that each person who physically transports, mails, or ships currency in an amount in excess of $5,000 from the United States to any place outside the country, or the reverse, make a report of such act. 31 C.F.R. § 103.23. The Government is silent as to its theory of how defendants conspired to violate this requirement. The indictment does not allege that any defendant did or intended to physically transport currency from the United States to another country. Count one cannot be sustained on an alleged violation of this section.

After careful examination of the indictment and all the evidence before us, we fail to see a conspiracy to violate Title 31, §§ 5313, 5314, 5315 or 5322(b). Count 1 of the indictment is accordingly dismissed.

Remaining Counts and Motions

With the dismissal of count one, most of defendants' pending motions have become moot. These include:

1. Defendants' request that the Court inspect the minutes of the grand jury;

2. Defendants' motions for further discovery;

3. Dreifus' suppression motions;

4. Dreifus' motion for severance of his trial; and

5. Yorizzo's motion to sever count one or, in the alternative, to sever his trial from that of the other de-

fendants. Each of these motions assumes the validity of count one and is therefore dismissed as moot.

Count three of the indictment charges Goldberg with carrying a firearm during the commission of a felony, "specifically the conspiracy set forth in Count One of the Indictment." Although no motion to dismiss has been addressed to the Court, it is apparent that this count must also fail.

Goldberg has moved for dismissal of count four on the ground that it is insufficiently pleaded. The sufficiency of an indictment turns on whether or not it conforms to minimal constitutional standards. U.S. Const. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."). These standards require that the defendant be called to answer charges actually brought by the Grand Jury and be informed of the time, place and essential elements of the crime to permit preparation of a defense and protection against double jeopardy. *United States v. Russel* (1962) 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240; *Bartell v. United States* (1913) 227 U.S. 427, 33 S.Ct. 383, 57 L.Ed. 583; *United States v. Haas* (5th Cir. 1978) 583 F.2d 216.

Count four charges, in its entirety:

> On or about October 24, 1983, in the Southern District of New York, DAVID GOLDBERG, the defendant, unlawfuly, knowingly, and wilfully [sic] did corrupt, obstruct, impede and attempt to obstruct and impede the due administration of justice. (Title 18, United States Code, § 1503.)

Although at oral argument we indicated the view that the count was sustainable, we have since come to a contrary

conclusion. No facts—except a general time and place—are provided which would apprise the defendant of the charge or protect against double jeopardy. In every case cited to us in which an obstruction of justice charge was found sufficient, the indictment alleged some facts to alert the accused to the conduct specifically in issue.[7] *See, e.g., United States v. Weiss* (2d Cir. 1974) 491 F.2d 460, 466, *cert. denied* 419 U.S. 833, 95 S.Ct. 58, 42 L.Ed.2d 59 (defendant charged with corruptly endeavoring to obstruct justice by failing to produce documents which defendant was commanded to produce by subpoena); *United States v. Nicosia* (7th Cir.1980) 638 F.2d 970, 975 (obstruction charge alleged that defendant endeavored to influence a witness to testify falsely; charge listed specific lies the defendant instructed the witness to tell); *United States v. Haas* (5th Cir.1978) 583 F.2d 216, 221 (charge of endeavoring to influence and impede a grand juror included the name of the grand juror and the grand jury, the matter before the grand jury, the information communicated on that subject matter, and the means of communication). No such facts are alleged in the instant indictment. Absent some notice to the defendant of the

7. The Government had cited several cases—none dealing with alleged obstruction of justice—which illustrate a general inhospitality to this type of motion. All these cases use the expression that "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Mayo* (2d Cir.1983) 705 F.2d 62, 78; *United States v. Tramunti* (2d Cir.1975) 513 F.2d 1087, 1113, *cert. denied,* 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50; *United States v. Sperling* (2d Cir. 1974) 506 F.2d 1323, 1344, *cert. denied* 420 U.S. 962, 95 S.Ct. 1351, 43 L.Ed.2d 439; *United States v. Salazar* (2d Cir.1973) 485 F.2d 1272, 1277, *cert. denied* 415 U.S. 985, 94 S.Ct. 1579, 39 L.Ed.2d 882. Here, however, the Government has done *absolutely* no more than track the language. The indictment would have been just as informative if it had alleged that "on October 24, in the Southern District of New York, defendant David Goldberg violated Title 18, United States Code, section 1503."

conduct in issue, the charge is constitutionally infirm and must be dismissed.[8]

In summary, counts one, three and four of the indictment are dismissed. Count two, heretofore not discussed, which names only defendant Goldberg and alleges that he "unlawfully, knowingly, and wilfully did receive and possess a firearm which was not registered to him" remains.

So Ordered.

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8. The Government did tell the defendant, both at oral argument and by letter, that the specific conduct at issue in count four was the destruction and removal of certain documents from the premises of UMB. The Government's belated notice, however, cannot cure the indictment. The defendant may be called to answer only charges actually brought by the grand jury, and not a prosecutor's amplification of those charges. *See United States v. Haas* (5th Cir. 1978) 583 F.2d 216, 219.